

**IMMUNITY PASSPORTS WITH RESPECT
TO THE CHARTER OF HUMAN RIGHTS AND FREEDOMS**

May 2021

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INTRODUCTION

The Human and Youth Rights Commission¹ is responsible for enforcing and promoting the principles set out in the Quebec Charter of Human Rights and Freedoms². It also protects the child's interests and upholds and promotes child rights afforded to them under the *Youth Protection Act*³. It also ensures enforcement of the *Act respecting equal access to employment in public bodies*⁴.

With the current pandemic, many states are looking for ways to decrease travel and contact restrictions while minimizing public health risks⁵. With this in mind, several immunity passport⁶ projects are being developed around the world⁷. The government of Quebec is interested in such a tool⁸. The Public Health Ethics Committee⁹ of the Institut national de santé publique du Québec [Quebec National Public Health Institute]¹⁰ has published a brief in which it considers:

“the desired benefits [from using an IP] in terms of welfare, freedom, and solidarity are slightly greater than the disadvantages identified in terms of equity, privacy, and efficiency related to travel and leisure activities.”¹¹ [Our translation.]

1 Hereinafter referred to as the "Commission".

2 *Charter of Human Rights and Freedoms*, CQLR, c. C-12 (hereinafter referred to as the "Charter").

3 *Youth Protection Act*, CQLR, c. P-34.1.

4 *Act respecting equal access to employment in public bodies*, CQLR, c. A-2.01.

5 Teck Chuan VOO *et al.*, "Immunity certification for COVID-19: ethical considerations", (2021) 99 *Bulletin of the World Health Organization* 155, p. 155.

6 As we do not know which model of tool will be offered in Quebec, if any, we use the term "immunity passport" (hereafter "IP"), which is defined in section 1.

7 ROYAL SOCIETY, "Twelve criteria for the development and use of COVID-19 vaccine passports", 2021, p. 16, [Online]. <https://royalsociety.org/-/media/policy/projects/set-c/set-c-vaccine-passports.pdf> ; ADA LOVELACE INSTITUTE, "What place should COVID-19 vaccines passports have in society?", Rapid expert deliberation 2021, p.2-3, [Online]. <https://www.adalovelaceinstitute.org/summary/covid-19-vaccine-passports/>

8 Jérôme LABBÉ, « Dubé songe à fournir un "passeport" aux Québécois vaccinés contre la COVID », Radio-Canada, February 25, 2021, [Online]. <https://ici.radio-canada.ca/nouvelle/1773314/document-preuve-digitale-vaccination-gouvernement-legault-covid-19>

9 Hereinafter referred to as "PHEC".

10 Hereinafter referred to as "INSPQ".

11 Public Health Ethics Committee, "Opinions Regarding Immunity Passports" [Avis sur les passeports immunitaires], INSPQ, 2021, p. 1, [Online]. <https://www.inspq.qc.ca/sites/default/files/publications/3123-passeports-immunitaires.pdf>

Citing the limitations of the ethical analysis¹², the Committee states:

“The PHEC is fully aware that the analysis of legal issues concerning possible measures proposed by governments or the private sector could influence its decisions.”¹³ [Our translation.]

The Government of Canada is advocating for the use of an IP to facilitate international travel¹⁴.

Under the circumstances, the Commission believes it is appropriate to exercise its mandate to conduct research on fundamental rights and freedoms¹⁵. This work forms part of an exercise to monitor the impact of the pandemic and the steps taken to protect ourselves from it with respect to the rights and freedoms guaranteed by the Charter. It also makes it possible to better respond to requests for information or to deal with any complaints that may be received in this regard. Therefore, the Commission is using its expertise in human rights issues to address some of the conditions under which the implementation of an IP project would comply with the provisions of the Charter.

The Commission does not oppose altogether to the adoption of an IP. However, the Commission believes that the compatibility of such a tool with the provisions of the Charter depends on several factors, including the circumstances in which it is used, the physical form it will take, and the expected effectiveness of the vaccines. The proposed analysis is limited by the absence of a concrete project to rely on and by the evolution of the scientific information currently available. However, it is possible to set out certain guidelines that can guide decision makers in the development of such a project.

¹² *Id.*, p. 4.

¹³ *Id.*, p. 5.

¹⁴ Stéphane BORDELEAU, « Ottawa adhère finalement au principe d'un passeport vaccinal pour les voyageurs », *Ici Radio-Canada*, May 3 2021, [Online]. <https://ici.radio-canada.ca/nouvelle/1789863/covid-passeport-vaccination-ottawa> ; Mélanie MARQUIS, “Ottawa veut un passeport vaccinal de voyage”, *La Presse*, May 3, 2021, [Online]. <https://www.lapresse.ca/covid-19/2021-05-03/ottawa-veut-un-passeport-vaccinal-de-voyage.php>.

¹⁵ Charter, s. 71, al. 2 (5°).

It is important to remember that the framework provided by the Charter is binding on both private¹⁶ and public¹⁷ stakeholders and that sections 1 to 38 of the Charter take precedence over any provisions of Quebec law that are contrary to the Charter¹⁸. Furthermore, the rights and freedoms guaranteed by the Charter remain applicable even in the wake of a health emergency as authorized by the *Public Health Act*¹⁹.

It is also worth noting that the use of an IP raises issues similar to those raised by notification or contact tracing applications²⁰, regarding which the Commission published an opinion in 2020²¹.

First, we will explain what IPs are and then consider the rights and freedoms that could be compromised by the implementation of such a mechanism. We then examine the application of section 9.1, the clause in the Charter that justifies certain infringements of rights.

1. IMMUNITY PASSPORTS

According to the PHEC, IPs “are defined as the use of any proof issued by a designated authority attesting to an individual’s immunity from COVID-19 in order to access activities otherwise inaccessible during a pandemic.”²² This immunity may be acquired through previous infection or through vaccination.

From a pragmatic standpoint, the Royal Society of London suggests that IPs can serve two purposes: to demonstrate that the holders:

¹⁶ *Godbout v. Longueuil (Ville)*, [1997] 3 R.C.S. 844, par. 93.

¹⁷ Charter, s. 55.

¹⁸ Subject to an express exemption: Charter, s. 52.

¹⁹ CQLR, c. S-2.2, s. 118 et seq.

²⁰ Ignacio N. COFONE, “Immunity Passports and Contact Tracing Surveillance”, (2021) 24, *Stanford Technology Law Review* (forthcoming).

²¹ Human Rights and Youth Rights Commission, *Brief to the Committee on Institutions of the National Assembly concerning specific consultations and public hearings regarding technology-based contact notification tools, as well as the relevance of this type of tool, its usefulness and, if applicable, the conditions for its social acceptability in the fight against COVID-19*, (Cat. 2.412.135), 2020, [Online].
https://cdpdj.qc.ca/storage/app/media/publications/memoire_consultation_outils_notification_covid-19.pdf

²² PUBLIC HEALTH ETHICS COMMITTEE, supra note 11, p.1. [our translation.]

- “are protected from illness so they can carry out the activities for which the passport is needed and avoid additional burdens on health services; and,
- cannot become infectious and transmit SARS-CoV-2 to others.”²³

The other expected advantages in terms of boosting economic activity or recovering individual freedoms are related to the second purpose.

According to the Ada Lovelace Institute, which called an emergency meeting of 17 experts from different fields of expertise to discuss areas of consensus regarding the use of IPs, this type of tool should include three types of information:

- health information (vaccine status through e.g. a certificate);
- verification of identity (connecting the holder to that certificate); and,
- authorisation for the purpose of allowing or blocking actions (a pass).²⁴

According to the Royal Society, the only health information that would be useful in making an IP and that is currently available is a “recent negative RNA (PCR) test within a particular time-specified interval to certify that subject is unlikely carrying a transmissible infection” of vaccination²⁵. Neither of these two factors can tell whether a person is a carrier and whether or not he or she is definitely contagious²⁶.

IPs could be developed in a variety of ways, each with its own unique challenges. Paper formats or various computer formats could be considered.

It should be noted that only one vaccine is currently mandated by the *International Health Regulations* adopted by the World Health Organization [hereinafter referred to as “WHO”], namely that against yellow fever²⁷. In their study regarding considerations for the use of COVID-

²³ ROYAL SOCIETY, *supra* note 7, p.2.

²⁴ ADA LOVELACE INSTITUTE, *supra* note 7, p.2.

²⁵ ROYAL SOCIETY, *supra* note 7, p. 2.

²⁶ *Id.*, p. 7.

²⁷ World Health Organization, *International Health Regulations*, 3rd Ed., 2005, p. 67 (Appendix 7): “Vaccination against yellow fever may be mandatory for any traveller leaving an area where the Organization has

19 vaccination certificates, the group of experts called together by Canada's Chief Scientific Officer states:

“Compared to other vaccination certificates, such as that for yellow fever, COVID-19 vaccination certificates present more complexity due to factors such as the multiplicity of available COVID-19 vaccines and the uncertainty regarding their efficacy against the different virus strains spread across the globe”.²⁸

The Canadian Civil Liberties Association stresses that there are fundamental differences between proof of immunization which may be required in specific circumstances, such as at borders or at school registration, and an IP which may be required by a variety of private or public actors, in a wide range of settings where the risks and benefits involved vary²⁹.

2. RIGHTS THAT MIGHT BE COMPROMISED BY THE USE OF AN IMMUNITY PASSPORT

In the best of circumstances, the IP is likely to contribute to the implementation of rights and freedoms guaranteed by the Charter, for example, by allowing greater freedom of movement³⁰ or by ensuring fair and reasonable working conditions that respect health, safety and physical integrity³¹. However, several of the rights and freedoms guaranteed by the Charter may be compromised by the use of an IP. The issue at hand is not about creating proof of vaccination or

determined that there is a risk of transmitting yellow fever.”, [Online].
https://apps.who.int/gb/ebwha/pdf_files/WHA67/A67_R13-fr.pdf

²⁸ Office of the Chief Scientific Officer, *Scientific Considerations related to the Use of COVID-19 Vaccination Certificates*, Report of the Chief Scientific Officer of Canada, March 31, 2021, [Online].
https://science.gc.ca/eic/site/063.nsf/eng/h_98229.html .

²⁹ Canadian Civil Liberties Association, “CCLA Live Updates, FAQ : Vaccine Passports”, April 13, 2021, [Online]. <https://ccla.org/vaccine-passport-faq/>.

³⁰ Charter, s. 1.

³¹ Charter, s. 46.

proof of immunity, but about its use outside a strictly medical context³². In fact, there is already a vaccination registry in Quebec³³.

Nevertheless, some of these alleged infringements upon Charter rights and freedoms may be justified under section 9.1 of the Charter, which we discuss in section 3.

2.1 Right to Inviolability

The *Public Health Act* allows the government or the Minister to order mandatory immunization of all or part of the population against a contagious disease that threatens the health of the population during a health emergency³⁴. However, this order has to be consistent with the provisions of the Charter and respect the rights and freedoms therein.

At this time, neither the government nor the Minister has mandated vaccination³⁵.

However, reliance on an IP could be an indirect way to force people to get vaccinated.

In fact, requiring someone to present an IP to access a venue, service, business or job, for example, puts pressure on that person to get vaccinated.

³² Secretary General of the Council of Europe, *Protection of human rights and "Vaccine Pass"*, informative documents SG/Inf(2021)11, 2021, p. 3, [Online]. <https://rm.coe.int/protection-des-droits-de-l-homme-et-pass-vaccinal/1680a1fac3>; Also refer to Council of Europe, Bioethics Committee, *Statement on Human Rights Issues Related to "Vaccine Pass" and Similar Documents*, 2021, p. 3, [Online]. <https://rm.coe.int/dh-bio-2021-7-final-statement-vaccines-f/1680a259de>; COUNCIL OF EUROPE, DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW, ADVISORY COMMITTEE ON THE CONVENTION OF INDIVIDUALS REGARDING AUTOMATIC PROCESSING OF PERSONAL DATA (CONVENTION 108), *VACCINATION, COVID-19 CERTIFICATE AND DATA PROTECTION*, STATEMENT T-PD-BUR (2021) 6rev2, 2021, p. 5, [Online]. <https://rm.coe.int/t-pd-bur-2021-6rev2-declaration/1680a25712>.

³³ *Public Health Act*, supra note 19, s. 61 et seq.

³⁴ *Id.*, par. 123 (1°)

³⁵ *Ministerial Order 2021-024 of the Minister of Health and Social Services*, (2021) 153 G.O. II, 1785A, compels health care workers to be vaccinated. It does, however, provide them with an alternative, to receive three screenings per week. For purposes of this opinion, we decline to comment on the compliance of this ordinance with the provisions of the Charter. However, we note that it goes against the position recommended by the INSPQ: INSPQ, PHEC, *Opinion on mandatory vaccination of health care workers against COVID-19*, 2021, [Online]. <https://www.inspq.qc.ca/sites/default/files/publications/3091-avis-vaccination-obligatoire-travailleurs-sante-covid19.pdf>.

Yet, vaccination constitutes an infringement of the right to inviolability³⁶. In fact, as stated by the Supreme Court of Canada when referring to section 1 of the Charter:

“No matter how necessary a medical treatment may be, any medical treatment, and most especially surgery, is a breach of what is, as a rule, the inviolability of an individual’s person. That is why there must be consent, which the courts required to be enlightened consent.”³⁷

The Superior Court found that by imposing a vaccination requirement, a school board is infringing of the right to integrity³⁸.

The right to integrity as well as the requirement to give consent to any medical treatment are also enshrined in the Civil Code of Quebec:

“3. Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.

These rights are inalienable.

[...]

10. Every person is inviolable and is entitled to the integrity of his person.

Except in cases provided for by law, no one may interfere with his person without his free and enlightened consent. 11. No one may be made to undergo care of any nature, whether for examination, specimen taking, removal of tissue, treatment or any other act, except with his consent. Except as otherwise provided by law, the consent is subject to no other formal requirement and may be withdrawn at any time, even verbally.

[...]” [Emphasis]

³⁶ Charter, s. 1.

³⁷ *Marcoux v. Bouchard*, 2001 SCC 50, par 31.

³⁸ *Charbonneau v. Poupart*, [1990] R.J.Q. 1136 (C.S.). However, the Court ruled that this infringement was justified under the circumstances in terms of Section 9.1 of the Charter. In a recent ruling unrelated to COVID-19, the European Court recognized that vaccination has an impact on the right to integrity: *Case of Vavříčka and Others v. Czech Republic* (Applications No. 47621/13 and 5 others), 8 April 2021, par. 261. In dissent, Justice Wojtyczek stated that “physical integrity must be protected from involuntary medical treatments” (par. 8 of the dissent).

By consenting to be vaccinated, a person therefore gives up, in part, his or her right to integrity. To be valid, however, the waiving of a Charter right must be free³⁹ and informed⁴⁰. The same criteria for consent are used in the Civil Code with respect to consent to treatment⁴¹. In other words, consent legalizes the violation of the integrity of the person⁴².

As stated by the Commission during the consultations regarding contact notification applications, “for consent to be free and voluntary, the person entitled to the right must have had a real choice”⁴³. Yet, as the Supreme Court points out, the choice is meaningless if the employer makes it a condition of employment⁴⁴, and if the landlord⁴⁵ makes it a condition of tenancy⁴⁶. More recently, an adjudicative tribunal found that an employer’s imposition of treatment was an infringement of the worker’s integrity and that the worker’s consent under these circumstances was not valid as it was a condition of the employee’s continued employment⁴⁷.

³⁹ *Godbout v. Ville de Longueuil*, [1997] 3 R.C.S. 844, par. 72.

⁴⁰ *Mazraani v. Industrielle Alliance, Assurances et services financiers Inc.*, 2018 SCC 50, par. 43. This judgment was rendered with respect to the Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982* [Schedule B of the *Canada Act, 1982*] (1982, U.K., c. 11), but its findings are valid under the Quebec Charter.

⁴¹ Civil Code of Quebec, s. 1399.

⁴² H  l  ne GUAY, “Les droits de la personnalit  ” in the   COLE DU BARREAU DU QU  BEC, *Collection de droit 2020-2021*, Volume 3 – Personnes et successions, Titre I - Les personnes physiques,   ditions Yvon Blais, 2020, 52, p. 59.

⁴³ Human Rights and Youth Rights Commission, *supra* note 21.

⁴⁴ *Godbout v. City de Longueuil*, *supra* note 39, par. 72; Human Rights and Youth Rights Commission, Brief to the Public Finance Committee of the National Assembly on Bill 53, *Credit Reporting Officers Act*, (Cat. 2.412.132), 2020, p. 24, [Online].
https://cdpdi.qc.ca/storage/app/media/publications/memoire_PL53_agence_evaluation_credit.pdf.

⁴⁵ Human Rights and Youth Rights Commission, *id.*

⁴⁶ *Syndicat Northcrest v. Amselem*, 2004 SCC 47, par. 98. In that ruling, the waiving of the right was reflected in a declaration of co-ownership, but we believe that it is possible to draw a similar distinction with the rental of a dwelling.

⁴⁷ *Association des policiers de St-J  r  me m  tropolitain Inc. v. St-J  r  me (City)*, 2019 CanLII 114594 (QC SAT), par. 6263.

The requirement of an IP to access one's work, for example, which does not allow the worker to exercise a real choice regarding vaccination, could constitute an infringement of the right to integrity of that individual⁴⁸.

It should be noted that the second paragraph of Section 10 of the Civil Code of Quebec, quoted above, states that the law may provide for an infringement of the right to the integrity of the person without consent.

This means, by extension, that using an IP that would equate to an obligation to be vaccinated should be permitted only by law. It would be unlikely to happen through a private initiative.

However, such an infringement of the right to integrity could be justified under s. 9.1 of the Charter. We will discuss this further in Section 3.

2.2 Freedoms

The implementation of an IP could have an impact on many of the freedoms guaranteed by the Charter, such as personal liberty⁴⁹, and fundamental freedoms such as freedom of religion⁵⁰ or freedom of peaceful assembly⁵¹.

Personal liberty as set out in section 1 of the Charter includes, but is not limited to, physical liberty⁵². With respect to freedom of religion, the Supreme Court defines this as follows:

⁴⁸ It should be noted that in one of the rare decisions in Quebec involving the obligation to be vaccinated in the workplace, the Court of Quebec concluded that there was no infringement of the right to integrity in this case because the consequence (the exclusion from work) was considered an economic constraint: *Syndicats des professionnelles en soins infirmiers et cardio-respiratoires de Rimouski (FIQ) [Nursing and Cardio-Respiratory Care Professionals Union of Rimouski] v. Morin*, 2009 QCCS 2883, par. 30. However, Professors Flood, Thomas, and Wilson recently pointed out that decisions made regarding influenza vaccination, which is what this ruling addresses, should be applied with caution in relation to COVID-19 and should be tailored to suit different scientific contexts: Colleen M. FLOOD, Bryan THOMAS, Kumanan WILSON, "Mandatory vaccination for health care workers: an analysis of law and policy", (2021) CMAJ doi: 10.1503/cmaj.202755.

⁴⁹ Charter, s. 1.

⁵⁰ Charter, s. 3; Secretary General of the Council of Europe, *supra* note 32, p. 3.

⁵¹ Charter, s. 3; Secretary General of the Council of Europe, *id.*

⁵² *Ordre des comptables généraux licenciés du Québec [Order of Certified General Accountants of Quebec] v. Québec (Attorney General)*, 2004 CanLII 20542 (QC CA), par. 60.

“The right to freedom of religion enshrined in s. 2(a) of the Charter encompasses the right to believe and entertain the religious beliefs of one’s choice, the right to declare one’s religious beliefs openly and the right to manifest religious belief by worship, teaching, dissemination and religious practice.”⁵³ [Citation omitted.]

Freedom of religion not only protects beliefs, but also the practices dictated by those beliefs⁵⁴, which could include attending a place of worship or refusing certain medical treatments.

Freedom of peaceful assembly, however, protects “the physical act of meeting to communicate and exchange words and emotions”⁵⁵. Therefore, there is a collective dimension to it⁵⁶.

For some involved, the use of an IP could facilitate recovery of freedoms limited by health measures⁵⁷.

However, the possibility that the introduction of such a mechanism will encourage its use in places that are currently accessible to all persons who respect protective measures such as the wearing of masks or the maintenance of a physical distance between persons should not be overlooked⁵⁸. Some examples include businesses, public transportation, certain workplaces and places of worship. People who currently have access to these sites may lose it if they refuse or are unable to get the vaccine. In this case, the use of an IP would be an infringement of some of the freedoms guaranteed by the Charter.

Furthermore, the introduction of an IP for specific purposes could encourage its use by other actors who are not authorized to do so by law.

⁵³ *Citation on Same-Sex Marriage*, 2004 SCC 79, par. 57. This judgment was rendered under the provisions of the Canadian Charter of Rights and Freedoms, but freedom of religion is interpreted in the same way: *Syndicat Northcrest v. Amselem*, 2004 SCC 46, par. 37 and 40.

⁵⁴ *Multani v. Marguerite-Bourgeoys School Board*, 2006 SCC 6.

⁵⁵ Pierre BOSSET, “Racism movements and the Charter of Human Rights and Freedoms”, (1994) 35 :3 *C. of D.* 583, p. 603. [Our translation]

⁵⁶ *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, par. 64.

⁵⁷ Public Health Ethics Committee, *supra* note 11, p. 9; ADA LOVELACE INSTITUTE, *supra* note 7, p. 2.

⁵⁸ Jay STANLEY, “There’s a Lot That Can Go Wrong With ‘Vaccine Passports’”, ACLU News & Commentary, March 31, 2021, [Online]. <https://www.aclu.org/news/privacy-technology/theres-a-lot-that-can-go-wrong-with-vaccine-passports/>; Canadian Civil Liberties Association, *supra* note 29.

However, such infringements could be deemed justified under Section 9.1 of the Charter. We will discuss this further in Section 3.

2.3 Right to Privacy

As a result of the pandemic, there has been a loss of discretion about requesting personal information such as age or health status⁵⁹. The introduction of IP may further impinge on the right to privacy⁶⁰ guaranteed by Section 5 of the Charter.

It is very likely that this tool will contain health information about the individual (whether or not he or she has contracted COVID-19, whether or not he or she has been vaccinated, etc.) that will be shared with third parties. In addition, there is a chance that intrusive questions will be asked about why someone does not have an IP⁶¹ or that information can be inferred from not having an IP⁶².

However, the Commission believes that “health information is of a ‘highly sensitive’ nature”⁶³ and raises specific concerns⁶⁴. In addition, failure to maintain confidentiality in this regard could

⁵⁹ Tara PARKER-POPE, “How did you Qualify? For the Young and Vaccinated, Rude Questions and Raised Eyebrows”, *The New York Times*, March 26, 2021, [Online].

<https://www.nytimes.com/2021/03/26/well/live/vaccine-shaming-medical-privacy.html>

⁶⁰ Kumanan WILSON, Colleen M. FLOOD, “Implementing digital; passports for SARS-CoV-2 immunization in Canada”, (2021) CMAJ E486.

⁶¹ Carolynne BURKHOLDER-JAMES, “Insist or accommodate?”, *National Magazine*, April 14, 2021, [Online].

<https://www.nationalmagazine.ca/fr-ca/articles/the-practice/workplace/2021/insist-or-accommodate>

⁶² EUROPEAN DATA PROTECTION BOARD, EUROPEAN DATA PROTECTION SUPERVISOR, *Joint Opinion 04/2021 on the Proposal for a Regulation of the Parliament and of the Council on a framework for insurance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate)*, version 1.1, March 31, 2021, p. 10 (hereinafter referred to as “EDPB/EDPS”), [Online]. https://edpb.europa.eu/system/files/2021-04/edpb_edps_joint_opinion_dgc_en.pdf

⁶³ Human Rights and Youth Rights Commission, *Brief to the Social Affairs Commission regarding the draft bill pertaining to the Quebec Health Card*, (Cat. 2.412.96), 2002, p. 3 [Online].

https://cdpdj.gc.ca/storage/app/media/publications/carte_sante.pdf Human Rights and Youth Rights Commission, *Brief to the Committee on Institutions of the National Assembly on Bill 64, An Act to update legislative provisions with respect to the protection of personal information*, (Cat. 2.412.42.8), 2020, p. 72, [Online]. https://www.cdpdj.gc.ca/storage/app/media/publications/memoire_PL64_reenseignements-personnels.pdf; Also refer to Council of Europe, Bioethics Committee, supra note 32, p. 3.

⁶⁴ Human Rights and Youth Rights Commission, *Brief to the Health and Social Services Committee of the National Assembly regarding Bill 59, An Act respecting the sharing of certain health information*, (Cat. 2.412.67.9), 2012, p. 8, [Online].

result in a violation of the right to professional secrecy, respect for a person's reputation or discrimination on the basis of health status⁶⁵.

While the right to privacy can be waived in a valid manner⁶⁶, such a waiver must be made with free and informed consent. However, as with the right to integrity⁶⁷, in order to be considered free and informed, this waiver must be the result of a real choice. This is not the case if the use of an IP can be mandated by an employer, for example.

In addition, the use of information technology can lead to specific problems. As the Commission mentioned previously:

“It is important to contextualize the discussion around the search for digital tools against the pandemic in the broader context where development of new technologies brings economic interests into play that may conflict with the exercise of democracy and human rights and freedoms, particularly in relation to the exploitation of data.”⁶⁸ [Our translation]

The Commission also raised concerns about the sustainability of the monitoring tools developed in the current context⁶⁹. Other stakeholders have raised this concern about the normalization of monitoring in relation to the use of IPs⁷⁰. The Commission stated:

“[...] In the midst of the urgency caused by such crises, measures may not be subject to public debate about their effects on human rights. This context is also conducive to technosolutionism, where private entrepreneurs in the technology industry offer technical solutions to complex social problems while bypassing the democratic process. Therefore, it is not a matter of denying the advantages of technologies in terms of the protection of public health, but rather of ensuring that their deployment and use are subject to the democratic exercise and to an evaluation of their impact on human rights and freedoms.”⁷¹ [Our translation. Citations omitted.]

https://cdpdj.qc.ca/storage/app/media/publications/memoire_PL_59_reenseignements_sante.pdf; Human Rights and Youth Rights Commission (2020), *id.*, p. 73.

⁶⁵ Human Rights and Youth Rights Commission (2012), *id.*, p. 7; HUMAN RIGHTS AND YOUTH RIGHTS COMMISSION (2020), *id.*, p. 73.

⁶⁶ HUMAN RIGHTS AND YOUTH RIGHTS COMMISSION (2020), *id.*, p. 41.

⁶⁷ See *infra*, section 2.1.

⁶⁸ Human Rights and Youth Rights Commission, *supra* note 21, p. 10.

⁶⁹ *Id.*, p. 12.

⁷⁰ ADA LOVELACE INSTITUTE, *supra* note 7, p. 7; LIBERTY, “Liberty’s View on Immunity Passports”, February 9, 2021, [Online]. <https://www.libertyhumanrights.org.uk/issue/libertys-view-on-immunity-passports/>

⁷¹ Human Rights and Youth Rights Commission, *supra* note 21, p. 12-13.

Several authorities have recommended that the use of an IP should minimize the possible infringement of privacy rights that could result from the use of an IP. In particular, they urged the officials involved to:

- Strive to limit the risk of any secondary use of the data collected⁷²;
- Limit data collection to the minimum required⁷³;
- Avoid data centralization⁷⁴;
- Avoid storage of data by the people who access it⁷⁵;
- Ensure that IPs are temporary⁷⁶;
- Ensure that the mechanism for working with IPs is transparent⁷⁷; and
- Avoid geotagging⁷⁸.

Similarly, the Commission has stated that, in order to be considered free and informed, consent to the collection and use of personal data must be given for specific purposes⁷⁹, be limited to the

⁷² EDPB/EDPS, supra note 62, p. 7; T. C. Voo *et al.*, supra note 5, p. 157; ADA LOVELACE INSTITUTE, supra note 7, p. 7; Secretary General of the Council of Europe, supra note 32; p. 4; Council of Europe, BIOETHICS COMMITTEE, SUPRA NOTE 32, p.4.

⁷³ EDPB/EDPS, *id.*, p. 8; Council of Europe, BIOETHICS COMMITTEE, *id.*; COUNCIL OF EUROPE, DIRECTORATE GENERAL FOR HUMAN RIGHTS AND THE RULE OF LAW, ADVISORY COMMITTEE ON THE CONVENTION OF INDIVIDUALS REGARDING AUTOMATIC PROCESSING OF PERSONAL DATA (CONVENTION 108), supra note 32, p. 3-4.

⁷⁴ EDPB/EDPS, *id.*, p. 8; J. STANLEY, supra note 58; Council of Europe, Directorate General for Human Rights and the Rule of Law, Advisory Committee on the Convention of Individuals regarding Automatic Processing of Personal Data (Convention 108), *id.*, 2021, p.3.

⁷⁵ EDPB/EDPS, *id.*, p.8.

⁷⁶ EDPB/EDPS, *id.*, p. 8 and 10; Voo *et al.*, supra note 5, p. 157; Council of Europe, Directorate General for Human Rights and the Rule of Law, Advisory Committee on the Convention of Individuals regarding Automatic Processing of Personal Data (Convention 108), supra note 32, p.2.

⁷⁷ EDPB/EDPS, *id.*, p. 14; J. STANLEY, supra note 58; Council of Europe, Directorate General for Human Rights and the Rule of Law, Advisory Committee on the Convention of Individuals regarding Automatic Processing of Personal Data (Convention 108), *id.*, p.6.

⁷⁸ STANLEY, supra note 58; ROYAL SOCIETY, supra note 7, p. 11.

⁷⁹ Human Rights and Youth Rights Commission, *Brief to the Committee on Institutions of the National Assembly concerning the policy document entitled "Plus de transparence, pour une meilleure gouvernance : Plus de transparence dans le respect du droit à la vie privée et la protection des renseignements personnels"*, (Cat. 2.412.42.6), 2015, p. 8, [Online].
https://cdpdj.qc.ca/storage/app/media/publications/memoire_transparence-gouvernance.pdf; HUMAN RIGHTS AND YOUTH RIGHTS COMMISSION (2020), supra note 63, p. 68.

information necessary to achieve those purposes⁸⁰ and be valid only for the time period and purposes for which it was requested⁸¹.

Taking such precautions is likely to minimize the infringement of one's Charter right to privacy that may result from the use of IP. Nevertheless, this infringement must be justified in accordance with Section 9.1. We will discuss this in Section 3.

2.4 Right to Equality

Section 10 of the Charter guarantees everyone the right to full and equal recognition and exercise of their human rights and freedoms. Freedom from discrimination is essential to the right to equality.

Discrimination is defined as the presence of a distinction, exclusion or preference which is based on one of the grounds of discrimination set out in the Charter and nullifies or impairs a right or freedom guaranteed therein⁸².

The Commission recently reiterated:

“[. . .] that the impact of [technologies] must be assessed not only based on their objectives or purposes, but also on the actual outcomes that result from their use. In fact, the right to equality enshrined in the Charter protects everyone from discrimination regardless of the intention or good faith of the perpetrator.”⁸³ [Our translation.]

⁸⁰ Human Rights and Youth Rights Commission (2012), *supra* note 64, p. 13-14; Human Rights and Youth Rights Commission (2015), *id.*, p. 10.

⁸¹ HUMAN RIGHTS AND YOUTH RIGHTS COMMISSION, *Brief to the Social Affairs Commission of the National Assembly, Bill 83, An Act to amend the Act respecting health services and social services and other legislative provisions*, (Cat. 2.412.67.5), 2005, p. 12 [Online]. https://cdpdi.qc.ca/storage/app/media/publications/Memoire_PL_83_LSSSS.pdf; Human Rights and Youth Rights Commission (2015), *id.*, p. 10.

⁸² Charter, s. 10.

⁸³ Human Rights and Youth Rights Commission, *Brief to the Access to Information Commission on the consultation document “Artificial Intelligence”*, (Cat. 2.412.133), 2020, p.4, [Online]. https://cdpdi.qc.ca/storage/app/media/publications/memoire_consultation_CAI_IA.pdf; Human Rights and Youth Rights Commission, *supra* note 21, p. 17.

In any case, IPs should only be introduced if vaccines and/or screening tests are available to the general population⁸⁴. For example, in Ontario, the potential discriminatory nature of vaccine delivery to some people with disabilities, the elderly who are confined, residents of heavily impacted neighbourhoods and the homeless has been raised.⁸⁵

Through its potential to determine access to places, services or employment, the use of IPs may affect the exercise of rights and freedoms of individuals because they belong to a group affected by a prohibited ground of discrimination, including disability, age, social condition, “race” or ethnic or national origin.

2.4.1 Disability

Certain people may not be able to receive the vaccine or may be at a higher risk of complications than others because of their medical condition. Others may have difficulty getting the vaccine due to mobility issues. These people may be at a disadvantage in exercising their rights as a result of the imposition of an IP unless exceptions are made for them.

2.4.2 Age and Social Status

The IP format is an issue for some groups, especially if it is in electronic form and requires the use of a smartphone and some level of digital literacy⁸⁶.

As part of discussions on contact notification applications, the Commission showed that smartphone ownership was unevenly distributed by income, education and age⁸⁷. It specified :

⁸⁴ STANLEY, supra note 58; Ana BEDUSHI, *Digital Health Passports for COVID-19: Data Privacy and Human Rights Law*, Policy Brief, University of Exeter, Economic and Social Research Council, 2021, p. 4, [Online]. https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/awimages/research/Policy_brief_-_Digital_Health_Passports_COVID-19_-_Beduschi.pdf; ADA LOVELACE INSTITUTE, supra note 7, p. 6; ROYAL SOCIETY, supra note 7, p. 13; Council of Europe, Bioethics Committee, supra note 63, p.3.

⁸⁵ See *Daneshvar v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 3186 which recognizes the importance of equity issues regarding access to vaccines in the context of the pandemic but dismisses the application for judicial review on the basis of lack of jurisdiction.

⁸⁶ ADA LOVELACE INSTITUTE, supra note 7, p. 6.

⁸⁷ Human Rights and Youth Rights Commission, supra note 21, p. 25.

“Note that differences in access to an exposure notification application would fall within a context of increased inequalities during a pandemic where access to digital technologies has become a necessity for information and services, but also for economic activities, education, leisure and social interaction. These differences in access may well be discriminatory.”⁸⁸ [Our translation. Citation omitted.]

To avoid discrimination, it is therefore necessary to ensure that IPs are available in formats that are accessible to all persons.

In addition, recommendations for vaccination vary by age. In fact, there is no vaccine approved in Canada for people younger than 12 years old⁸⁹. Minors may be disadvantaged with respect to the exercise of their rights by the imposition of an IP unless exceptions are made for them.

Furthermore, people with a precarious immigration status have limited access to health care, in part because of fears about disclosure of that status⁹⁰. The use of an IP may therefore be discriminatory against them because of their social condition.

2.4.3 “Race” and Ethnic or National Origin

The panel of experts convened by Canada’s Chief Science Advisor expressed concern about the impact of the use of IPs upon the rights of individuals from certain racialized or disadvantaged communities. It stated:

“[...] [S]pecial attention needs to be directed to certain racialized, Indigenous and disadvantaged communities. These communities may lack trust in established medical institutions and/or their governments due to historical harms, such as experimentation without consent in residential schools and persistent inequitable care experienced in the

⁸⁸ *Id.*, p. 27.

⁸⁹ National Advisory Committee on Immunization, Recommendations for the use of COVID-19 vaccines, updated May 5, 2021, [Online]. <https://www.canada.ca/en/public-health/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines/may-3-2021.html>

⁹⁰ Human Rights and Youth Rights Commission, *Brief to the Health and Social Services Committee of the National Assembly regarding Bill 83, an Act pertaining primarily to the eligibility of certain children with parents whose immigration status is precarious for health insurance and prescription drug coverage*, (Cat. 2.412.139), 2021, [Online]. https://cdpdc.gc.ca/storage/app/media/publications/memoire_PL83_RAMQ_enfants.pdf.

medical system, leading to comparatively low vaccination intentions.”⁹¹ [Citations omitted.]

The potential for racialized people to be mistaken should the technology use facial recognition was also raised⁹².

On the other hand, the introduction of an IP could have discriminatory effects and require exceptions for persons who are discriminated against on grounds other than those listed above, such as religion or political beliefs, for example⁹³.

3. JUSTIFICATION CLAUSE

Section 9.1 of the Charter contains a justification clause which the legislator or a private person could, depending on the circumstances, invoke in the event that the fundamental rights and freedoms enshrined in sections 1 to 9 are violated. This clause reads as follows:

“In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, State laicity, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.”

Determining if infringements of Charter rights and freedoms are consistent with the Charter requires careful consideration. The process to follow is well defined and widely confirmed by the courts⁹⁴. The Supreme Court ruled that “under s. 9.1 the government must show that the restrictive law is neither irrational nor arbitrary and that the means chosen are proportionate to the end to be served”⁹⁵.

⁹¹ Office of the Chief Science Advisor, *supra* note 28.

⁹² STANLEY, *supra* note 58, p. 13.

⁹³ C. M. FLOOD, B. THOMAS, K. WILSON, *supra* note 48, p. 3.

⁹⁴ Human Rights and Youth Rights Commission, *Brief to the Committee on Institutions of the National Assembly regarding Bill No. 60, Charter Affirming the Values of Secularism and Religious Neutrality of the State and of Equality between Women and Men and Framing Requests for Accommodation*, (Cat. 2.113-2.13), 2013, at 29.

⁹⁵ *Ford v. Québec (Attorney General)*, [1988] 2 SCR. 712, par. 63.

The group of experts convened by Canada's Chief Science Advisor states:

"When using vaccination certificates beyond an immunization record, equity, human rights and privacy must be respected to achieve the delicate balance of necessity and proportionality, especially in the context of the evolving COVID-19 vaccine science."⁹⁶

Justification criteria established by case law are the same for Section 9.1 of the Quebec Charter as for Section 1 of the Canadian Charter of Rights and Freedoms⁹⁷.

The first step in determining whether an infringement of a Charter right or freedom is justified is to determine whether the objective pursued by the infringement measure is "of pressing and substantial concern in a free and democratic society"⁹⁸.

As mentioned above, IPs can have two distinct purposes:

1. Allowing the holder to continue activities authorized by the IP while preventing additional burden on health services; and/or
2. Proving that the holder cannot become infected and spread SARS-CoV-2 to others.⁹⁹

These objectives are part of the right to life, personal security and inviolability¹⁰⁰, personal freedom¹⁰¹ and fundamental freedoms¹⁰². Achieving these objectives is also consistent with the right to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being¹⁰³. The latter is embodied, among other things, in the *Act*

⁹⁶ Office of the Chief Science Advisor of Canada, *supra* note 28.

⁹⁷ *Ford v. Québec (Attorney General)*, *supra* note 95, par. 63.

⁹⁸ *R. v. Oakes*, [1986] 1 SCR. 103, p. 139

⁹⁹ ROYAL SOCIETY, *supra* note 7, p. 2.

¹⁰⁰ Charter, s. 1.

¹⁰¹ Charter, s. 1.

¹⁰² Charter, s. 3.

¹⁰³ Charter, s. 46.

respecting occupational health and safety, which obliges employers to “take the necessary measures to protect the health and ensure the safety and physical well-being of his worker”¹⁰⁴.

In any case, it is rare that justifications are rejected at this stage of the analysis¹⁰⁵.

The second step in determining whether an infringement of a Charter right or freedom is warranted is to apply a proportionality test. There are three parts to this test: proof of a rational connection between the contested measure and the objective pursued, proof that the measure infringes as little as possible on the right or freedom in question, proof that the harmful effects are proportional to the beneficial effects¹⁰⁶.

With respect to a rational connection, the person responsible for the imposition of an IP must show that there is “a causal connection, based on reason and logic, between the violation and the benefit sought.”¹⁰⁷ This connection cannot be arbitrary, inequitable or based on irrational considerations¹⁰⁸. The Supreme Court states:

“In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right.”¹⁰⁹

Therefore, the infringement of the rights and freedoms listed in Section 2 could be justified if the IP accomplished the objectives listed above, namely, to allow the holder to carry out the authorized activities without being an additional burden on the health care system and to allow the holder to carry out the activities authorized by the IP without being a vector for disease transmission.

¹⁰⁴ CQLR, c. S-2.1, s. 51.

¹⁰⁵ See: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, par. 26.

¹⁰⁶ *Dagenais v. Société Radio-Canada*, [1994] 3 SCR. 835, 889; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 SRC 877.

¹⁰⁷ *Carter v. Attorney General of Canada*, 2015 SCC 5, par. 99; *R. c. K.R.J.*, 2016 SCC 31, par. 68..

¹⁰⁸ *R. v. Oakes*, supra note 98, par. 70

¹⁰⁹ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199, p. 331.

However, several sources indicate that the scientific evidence currently available does not support the conclusion that Goal B can be achieved through vaccination¹¹⁰ or natural immunization¹¹¹.

The experts at the Ada Lovelace Institute state:

“The primary justification for sharing personal information with a third party that would affect rights and freedoms at an individual level is that it would allow that third party to protect themselves from serious harm. In other words, the vaccine passport is premised on the assumption that my vaccine status tells you something about the risk I pose to you, not simply the risk I face from COVID-19.

At present, vaccination status does not offer clear or conclusive evidence about any individual’s risk to others via transmission.”¹¹² [Emphasis]

Similarly, the WHO position, released on February 5, 2021, advises national authorities against the use of IPs as a prerequisite for international travel due to uncertainties about the ability of vaccines to reduce transmission¹¹³.

The situation is the same for natural immunization, which occurs as a result of having already contracted the disease. The WHO states:

“At this point in the pandemic, there is not enough evidence about the effectiveness of antibody-mediated immunity to guarantee the accuracy of an ‘immunity passport’ or ‘risk-free certificate.’ People who assume that they are immune to a second infection because they have received a positive test result may ignore public health advice. The use of such certificates may therefore increase the risks of continued transmission.”¹¹⁴

¹¹⁰ Public Health Ethics Committee, supra note 11, p.3; Public Health Ethics Committee, *Opinion on mandatory vaccination of health care workers against COVID-19*, INSPQ, 2021, p. 7, [Online]. <https://www.inspq.gc.ca/sites/default/files/publications/3091-avis-vaccination-obligatoire-travailleurs-sante-covid19.pdf>; EDPB/EDPS, supra note 62, p. 6; Canadian Civil Liberties Association, supra note 29, ADA LOVELACE INSTITUTE, supra note 7, p.1; ROYAL SOCIETY, supra note 7, p. 5; Office of the Chief Science Advisor of Canada, supra note 28; Council of Europe, Bioethics Committee, supra note 32, p.4.

¹¹¹ VOO *et al.*, supra note 5, p. 159; COUNCIL OF EUROPE, BIOETHICS COMMITTEE, *id.*, p. 4.

¹¹² ADA LOVELACE INSTITUTE, supra note 7, p. 4.

¹¹³ WHO, “Interim position paper : considerations regarding proof of COVID-19 vaccination for international travellers”, February 5, 2021, [Online]. <https://www.who.int/news-room/articles-detail/interim-position-paper-considerations-regarding-proof-of-covid-19-vaccination-for-international-travellers>.

¹¹⁴ World Health Organization, “Immunity passports” in the context of COVID-19, Scientific Brief, April 24, 2020, [Online]. <https://www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-covid-19>.

It seems equally important to take into account that the use of IPs may create a false sense of security in relation to the danger presented by the people who carry an IP¹¹⁵.

The situation is likely to undergo rapid change following future scientific developments. The group of experts convened by Canada's Chief Science Advisor:

"The utility of COVID-19 vaccination certificates beyond healthcare settings is predicated on the effectiveness of the vaccines at eliminating or reducing viral transmission and the duration of the protection they confer. Answers to these important scientific questions will continue to be generated over the coming months. Results may differ among the various authorized COVID-19 vaccines currently being administered worldwide. The length of time for which a vaccination certificate will be valid before a new one is required will need to be established for each vaccine and will depend on duration of immunity. In addition, varying efficacy at reducing infection by new variants and eliminating viral spread will need to be considered for each class of vaccines."¹¹⁶

It should be noted, however, that the government does not necessarily need to rely on scientific evidence to establish a rational connection between the measure, in this case the use of IPs, and the objective sought¹¹⁷. The government "must demonstrate that it is reasonable to assume that the restriction may contribute to the achievement of the objective, not that it will actually contribute to it."¹¹⁸ However, a causal link must be rationally inferred¹¹⁹.

The second step of the proportionality test under s. 9.1 of the Charter is called "minimal impairment" and "requires only that the government choose the least drastic means of achieving its objective"¹²⁰. At this stage, one must ask whether there is an alternative, less drastic means

¹¹⁵ ADA LOVELACE INSTITUTE, supra note 7, p. 5.

¹¹⁶ Office of the Chief Science Advisor, supra note 28; Note that on May 13, 2021, the U.S. government decided to lower its requirements for wearing face coverings "in light of scientific studies that showed that vaccines were equally effective against asymptomatic infections and circulating variants" and that "the few people who became ill despite being vaccinated were all found to be less infectious." Government authorities have also pointed out that these recommendations can be modified if the health situation worsens: AGENCE FRANCE-PRESSE, "Fin du masque à l'intérieur pour les Américains vaccinés" [End of Wearing Masks Indoors for Americans] *Le Devoir*, May 14, 2021, [Online]. <https://www.ledevoir.com/monde/etats-unis/601067/le-port-du-masque-n-est-plus-de-mise-pour-les-americains-vaccines-estiment-les-cdc>.

¹¹⁷ *Frank v. Canada (Attorney General)*, 2019 SCC 1, par. 64; *RJR-MacDonald Inc. v. Canada (Attorney General)*, soecifically, note 109, par. 154.

¹¹⁸ *Québec (Attorney General) v. A*, 2013 SCC 5, par. 359.

¹¹⁹ *Mounted Police Association of Ontario v. Canada (Attorney General)*, supra note 56, par. 145 to 148.

¹²⁰ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, par. 54 [italicized in the original].

of achieving the objective in a real and substantial manner"¹²¹. Note that a small number of impacted individuals is not a factor in determining minimum impairment:

“The question at this stage of the analysis is not how many citizens are affected, but whether the right is minimally impaired. Even one person whose Charter rights are unjustifiably limited is entitled to seek redress under the Charter. It follows that this legislation cannot be saved by the mere fact that it is less restrictive than a blanket exclusion [...].”¹²²

Regarding IPs, European data protection authorities recommend evaluating their effects and comparing them with those of measures that appear less intrusive¹²³. Voo *et al.*, with respect to certificates based on natural immunity, argue:

“Immunity certification should not be used to dictate which individuals or groups can access an area or activity during the pandemic (or after it, if a vaccine is not available) when other measures, such as face masks, physical distancing and hand hygiene, can be implemented to reduce risks to an acceptable level.”¹²⁴

Experts at the Ada Lovelace Institute encourage decision makers to consider the opportunity costs of using IPs:

“There will be opportunity costs to focusing on vaccine passports rather than other interventions. There may be a comparatively narrow window where there is scientific confidence about the impact of vaccines on transmission and enough of a vaccinated population that it is worth segregating rights and freedoms. Once there is population-level herd immunity it will not make sense to differentiate and passports would be unnecessary.

Passports may be a tempting distraction. They bring political, financial and human capital costs that must be weighed against their benefits. They might crowd out more important policies to reopen society more quickly for everyone, such as by vaccine rollout and test, trace and isolate schemes, and other public health measures.”¹²⁵

¹²¹ *Id.*, par. 55.

¹²² *Sauvé v. Canada (Chief Electoral Officer)*, supra note 105, par. 55.

¹²³ EDPB/EDPS, supra note 62, p. 6.

¹²⁴ Voo *et al.*, supra note 5, p. 157.

¹²⁵ ADA LOVELACE INSTITUTE, supra note 7, p. 6.

In the final step of the proportionality test, “requires the Court to weigh the deleterious effects against the salutary effects”¹²⁶. If the deleterious effects exceed the benefits of the measure, proportionality is not satisfied¹²⁷.

CONCLUSION

The Commission is in favour of implementing public health protection measures in the context of the current pandemic. However, it believes it is necessary to assess the specific impact of each of the introduced measures regarding the implementation of the rights and freedoms guaranteed by the Charter.

As a first step, and in accordance with the provisions of the Civil Code on the right to integrity, it appears that the implementation of an IP system should be subject to a legal framework.

Furthermore, implementation of such a system is likely to affect several of the rights and freedoms guaranteed by the Charter, including the right to inviolability, the right to personal liberty, fundamental freedoms, the right to privacy, and the right to equality of persons with respect to disability, age, social condition, and “race” and ethnic or national origin.

With regard to the fundamental rights and freedoms guaranteed by Sections 1 to 9 of the Charter, their infringement may be considered justified under Section 9.1 of the Charter.

In terms of IPs, the use of the justification clause of Section 9.1 of the Charter will vary according to the contexts of its use.

As such, private entities cannot claim the same objectives as governmental entities, in particular the ability of holders to continue their activities without placing an additional burden on the health care system.

¹²⁶ *Harper v. Canada (Attorney General)*, 2004 SCC 33, par. 119.

¹²⁷ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, par. 147.

As for the other objectives, in particular the protection of the health of third parties, the current state of scientific knowledge does not enable us to conclude that they can be achieved by means of IPs.

On the other hand, if the state of scientific knowledge should shift towards a recognition of the protective effect of vaccines against transmission, the effect on rights in different contexts of use would still need to be considered. In fact, some people believe that beyond the risk of discrimination, certain IP uses can have a direct impact on the rights and freedoms of the individuals concerned¹²⁸. For example, use by employers, public services or essential businesses does not affect the rights and freedoms of those excluded in the same way as use by an entertainment venue.

In Europe, data protection agencies have advised that the use of IPs for any purpose other than the movement of persons between EU Member States should be subject to an evaluation of their effectiveness, necessity and proportionality, and should include safeguards, especially to avoid abuse and risks of discrimination¹²⁹.

The Ada Lovelace Institute experts also advocate for a clear articulation of the use of IPs:

“While vaccine passports will be seen by some as a way to increase freedom, for those without a passport they would constitute a denial of liberties that others are being granted. Therefore the justifications both for the relaxation of current restrictions for some and also for their continuation for others should be clearly articulated.”¹³⁰

Lastly, the format of the IP, whether paper or digital, and in the latter instance, the specific characteristics of the technology, will have varying effects on the rights and freedoms guaranteed by the Charter, including the right to privacy and the right to equality. These differences in impact call for certain precautions regarding the collection, retention and use of health data, among other things.

¹²⁸ Michel C. AUGER, “Passeport vaccinal au Canada ? Entrevue avec Vardit Ravitsky”, *Midi Info*, Ici.Radio-Canada, May 3, 2021, [Online]. <https://ici.radio-canada.ca/ohdio/premiere/emissions/midi-info/episodes/530164/rattrapage-du-lundi-3-mai-2021/7>

¹²⁹ EDPB/EDPS, *supra* note 62, p. 8.

¹³⁰ ADA LOVELACE INSTITUTE, *supra* note 7, p. 3.

The Commission believes that all of these considerations must be taken into account by governmental authorities when deciding whether to implement an IP system so that it meets the requirements of the Charter.